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No. 00-1260

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, *Petitioner,*

v.

MARK JAMES KNIGHTS, *Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether respondent's agreement to a term of probation that authorized any law enforcement officer to search his person or premises with or without a warrant, and with or without individualized suspicion of wrongdoing, constituted a valid consent to search by a law enforcement officer investigating crimes.

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INTEREST OF AMICUS CURIAE

Pursuant to a probation search condition, California law enforcement officers searched respondent Knights's home without a warrant. Knights now challenges the constitutional validity of the condition. Knights agreed to the condition after being convicted of a misdemeanor drug offense. He signed a probation order (which a judge countersigned) acknowledging that he had read, understood and agreed to abide by specified terms and conditions of probation. They included conditions that he obey all laws, submit to drug or alcohol testing as directed by a probation officer or any peace officer, and "[s]ubmit his . . . person, property, place of residence, vehicle, [and] personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause, by any probation officer or law enforcement officer." *People v. Knights*, Napa County Municipal Court No. CR 33859, Order dated May 29, 1998; C.A.E.R. 73.

California writes to explain that law enforcement searches with or without a warrant or reasonable suspicion of new offenses can be based on consensual probation conditions consistent with this State's legislative policy. Searches under such consensual conditions are necessary to any realistic chance of success on probation for numerous

offenders in this State. They are conducted not only to enforce the criminal law, but also to deter the probationer from backsliding into criminal habits and assist in ensuring compliance with associated conditions of probation, such as drug testing by probation officers or peace officers, a condition to which Knights also agreed. For some offenders whose offenses carry a heavy risk of recidivism, such search conditions are deemed by California law to be indispensable to conditional release. Because this State's legislative policy precludes probation except upon the consent of the offender to probation on such conditions as will both secure the public safety and address the rehabilitation of the individual, an individual assessment by the sentencing court is required of the appropriateness of search conditions in relation to the offense and the prospects for the offender's rehabilitation. The offender retains the choice of either accepting the conditions of probation or undergoing the sentence, and the sentencing court's assessment is subject to review on appeal.

Knights chose probation and now wants the Fourth Amendment to relieve him of the consequences of his choice. After the fact, he seeks to qualify his consent with a proviso that searching law enforcement officers must enforce probation, not investigate crimes. Similarly, the opinion below views detectives to be engaged in a subterfuge by obtaining evidence of a crime using a probation search condition without the purpose to rehabilitate the probationer. However, searches based upon consent to warrantless searches with or without reasonable cause by "any probation officer or law enforcement officer" are not lacking a probationary purpose. Just as the susceptibility of the probationer to *potential* warrantless, suspicionless searches encourages obedience to the conditions of probation by deterring criminal activity, *actual* searches to investigate crime are undergirded with a probationary purpose because a new crime is a violation of probation. California has a strong interest in defending its probationary system, including its reliance upon consensual probation conditions to investigate criminal conduct by its probationers, conduct that would invariably be a violation of the terms of probation and that would potentially demonstrate that the reformatory purpose of probation was no longer viable.

SUMMARY OF ARGUMENT

Permitting probationers to repudiate their consent to searches by law enforcement seeking evidence of new crimes would significantly impair California's ability to monitor its probationers. At a minimum, if the probationer is under supervision, police likely would have to first request the probation officer to decide whether a search for evidence of a probation violation was warranted, which is at odds with consent to searches *without* reasonable cause by probation officers *or* law enforcement officers. Even if such authorization were obtained, however, evidence of a new crime might still be subject to suppression if a court later decided the probation officer was merely a "stalking horse" for law enforcement. Additionally, in the case of a summary probationer like respondent Knights, prior judicial authorization would probably be required to invoke consensual search conditions to investigate new crimes because a probation officer who did not supervise the probationer could be deemed an interloper and the evidence likewise suppressed.

Such qualifications and special exceptions to enforcing search conditions run counter to any rational operation of this State's probation system. Consent-based conditions for law enforcement searches of probationers reflect important reformatory objectives in California. Not the least of those objectives is to enhance the level of the State's supervision of a widely dispersed and diverse population of probationers. Local law enforcement officers often have more familiarity with a probationer's behavior, associations and ongoing criminal predilections than the probation staff. Additionally, personal acknowledgment by the offender in accepting probation of the responsibility to submit to searches by law enforcement officers encourages conforming habits and behavior that do not invite suspicion of probation violations such as new crimes during the term of probation. Such probation search conditions also may assist in reducing confrontation when searches occur. And it reinforces to the probationer that pliancy is not merely desired, but enforceable since resistance to a law enforcement search may violate the probation condition.

For these and other reasons, searches for investigative purposes by law enforcement officers pursuant to consent are essential

for effective probationary supervision in particular cases and reflect a reasonable policy of allocating finite probation resources among offenders in this State. The California Supreme Court admits evidence procured in reliance upon similar probation orders as the product of valid consent under the Fourth Amendment because such searches meet the goals of the State's probation system. *See People v. Bravo*, 738 P.2d 336, 342 (Cal. 1987). Nothing in the Fourth Amendment decisions of this Court dictate a different choice by California.

ARGUMENT

CALIFORNIA ALLOWS PROBATIONERS TO CONSENT TO SEARCHES WITH OR WITHOUT A WARRANT OR REASONABLE SUSPICION EITHER BY PROBATION OFFICERS OR LAW ENFORCEMENT OFFICERS FOR LEGITIMATE REFORMATORY OBJECTIVES

A search conducted pursuant to a valid consent is an exception to the requirements of both a warrant and probable cause under the Fourth Amendment. *Schneckloth v. Bustamonte* 412 U.S. 218, 219 (1973).

Three decades ago in *People v. Mason*, 488 P.2d 630 (Cal. 1971), the California Supreme Court approved searches conducted under the authority of a condition of probation by law enforcement officers seeking evidence of a crime. It did so, recognizing the dual purpose in this State of such provisions to deter further offenses by the probationer and to ascertain whether he or she is complying with the terms of probation. *Id.* at 632. The state supreme court held that probation searches are a product of consent and valid under *Zap v. United States*, 328 U.S. 624 (1946), *vacated,* 330 U.S. 800 (1947)(per curiam).[1/] *See Mason*, 488 P.2d at 633. In *Zap*, this Court rejected a challenge by a government contractor convicted of presenting false claims to a search conducted pursuant to a contract provision allowing inspection of the accounts, saying that "when petitioner, in order to obtain the government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to

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1. Although the judgment in *Zap* was vacated, this Court has continued to cite the decision in its Fourth Amendment jurisprudence in cases such as *Bustamonte*, 412 U.S. at 219.

those contracts." 328 U.S. at 628. Similarly, the California Supreme Court held, "when [a] defendant in order to obtain probation specifically agree[s] to permit at any time a warrantless search of his person, car and house, he voluntarily waive[s] whatever claim of privacy he might otherwise have had."[2/] 488 P.2d at 634.

Nor must a searching officer have reasonable suspicion of a new crime if the offender accepts probation conditioned upon a waiver of Fourth Amendment rights. *People v. Bravo*, 738 P.2d 336 (Cal. 1987). In *Bravo*, the probation condition required the probationer to "[submit his person and property to search and seizure at any time of the day or night by any law enforcement officer with or without a warrant." *Id.* at 337 n1. The California Supreme Court noted that under state law, "'[i]f the defendant considers the conditions of probation more harsh than the sentence the court would otherwise impose, he has the right to refuse probation and undergo the sentence.'" *Id.* at 341. Citing *Bordenkircher v. Hayes*, 434 U.S. 357, 360-64 (1978), the court observed that "[a] probationer's waiver of his Fourth Amendment rights is no less voluntary than the waiver of rights by a defendant who pleads guilty to gain the benefit of a plea bargain." *Bravo*, 738 P.2d at 341. Unless a sentencing judge in the exercise of discretion places a requirement of "reasonable cause" in the probation search condition either initially or as a modification of the terms of probation, *id.* at 340 n.6, a probationer in California accepting a condition authorizing warrantless searches is "subject to search at any time for a proper probation or law enforcement purpose," consistent with the scope of the consent to warrantless searches. *Id.* at 341. A "search or seizure pursuant to a valid consent

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2. Other states uphold conditions of release authorizing searches by law enforcement officers. *See, e.g., State v. Montgomery*, 566 P.2d 1329, 1330-31 (Ariz. 1977); *State v. Perbix*, 331 N.W.2d 14, 21-22 (N.D. 1983); *Anderson v. Commonwealth*, 490 S.E.2d 274, 276-77 (Va. Ct. App. 1997), *aff'd on re'hg en banc*, 495 S.E.2d 547 (Va. Ct. App.), *aff'd*, 507 S.E.2d 339 (Va. 1998); *see also* Jay M. Zitter, Annotation, *Validity of Requirement That, As Condition of Probation, Defendant Submit to Warrantless Searches*, 2000 A.L.R. 3 (tentative draft), *available at* 2000 WL 798014.

does not violate the Fourth Amendment, [and] . . . is not unreasonable unless it exceeds the scope of the consent." *Id.* at 342. The probation condition in *Bravo* expressly waived "'whatever claim of privacy [the probationer] might have otherwise had.'" *Id.*, *quoting Mason*, 488 P.2d at 634. The court in *Bravo* noted, "Were we to conclude that a probationer's waiver of Fourth Amendment rights were either impermissible or limited to searches conducted only upon a reasonable-suspicion standard, the opportunity to choose probation might well be denied to many felons by judges whose willingness to offer the defendant probation in lieu of prison is predicated upon knowledge that the defendant will be subject to search at any time for a proper probation or law enforcement purpose. We see no basis for denying a defendant the right to waive his Fourth Amendment rights in order to accept the benefits of probation." *Bravo*, 738 P.2d at 341. Because the purpose of unprovoked searches is to both deter the probationer from committing new offenses and to assess his continued amenability to rehabilitation by determining whether he is obeying the law, according to the state court, conditioning warrantless searches upon reasonable cause would render the probation order superfluous. *Id.* at 342.

Accordingly, not all probationers in California have search conditions, and those who do have such conditions consented to them at the time of sentencing.[3/] *People v. Woods*, 981 P.2d 1019, 1025 n.5 (Cal. 1999). Offenders do not have to refuse probation to seek judicial review of a search condition, but must object at the time of the sentencing hearing to obtain such review. *Id.* In California, search conditions are not imposed on probationers based on special needs of a regulatory system beyond the need for law enforcement as in *Griffin v. Wisconsin*, 483 U.S. 868, 873-75 (1987), but are the product of a judicial assessment

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3. By contrast, parolees, who may not refuse release, are by law subject to searches without warrant or cause at any time of the day or night by parole or peace officers. *See* Cal. Penal Code § 3067; Cal. Code Regs., tit. 15, § 2511(b). Such searches are justified by the parolees reduced expectation of privacy and the special needs attendant to monitoring of the parolee's transition into society. *See People v. Reyes*, 968 P.2d 445, 450-51 (Cal. 1998).

that enforcement searches are appropriate under the governing considerations for release defined by state law if the particular offender accepts probation.[4]

It is clear that "whether the purpose of the search is to monitor the probationer or to serve some other law enforcement purpose, or both, the search in any case remains limited in scope to the terms articulated in the search clause[.]" *Woods*, 981 P.2d at 1027-28. The contrary argument is reminiscent of *Zap*, 328 U.S. at 628, where the Court was presented with a "suggestion that the search was unreasonable because made by agents of the Federal Bureau of Investigation who were not persons authorized to conduct those [contract audit] examinations." While finding the agents had acted under the auspices of Navy Department representatives authorized to inspect, the Court also stated that "the right to inspect granted by the contracts was not limited to inspections by the Navy but extended to inspections by any authorized representatives of the government among whom the agents of the Federal Bureau of Investigation are included." *Id.* at 628-29. On this basis, the agents were "lawfully on the premises." *Id.* at 629. Similarly, there is no reason to find the search consent in this case did not encompass searches by sheriff's detectives acting as law enforcement officers.

The suggestion is made that "[n]o state, by statute, expressly permits a warrantless search by peace officers" and that California in particular has not clearly authorized such warrantless searches in its probation statutes. Br. of Amicus Curiae Rutherford Institute at 6, 11-12. Both assertions distort California law. California statutes provide broad discretion to determine whether probation is appropriate and what conditions should be imposed. *People v. Welch*, 851 P.2d 802, 805 (Cal. 1993). *See* Cal. Penal Code §§ 1203(b)(3), 1203a. Most conditions stem

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4. As one commentator has observed, *Griffin* was a "special needs" case involving a regulatory system which imposed probation searches on "*all* probationers, *without their consent*, and *regardless of the crime they committed.*" Sean M. Kneafsey, Comment, *The Fourth Amendment Rights of Probationers: What Remains After Waiving Their Right to Be Free From Unreasonable Searches and Seizures?*, 35 Santa Clara L. Rev. 1237, 1257 (1995).

from a statutory grant of discretion to the court to impose such "reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer." *Welch*, 851 P.2d at 805-06; *see* Cal. Penal Code § 1203.1(j). *Mason*, 488 P.2d 630, held that a condition of probation for warrantless searches by police officers was valid under § 1203.1 as "reasonably related to the probationer's prior criminal conduct and . . . aimed at deterring or discovering subsequent criminal offenses." *Id.* at 632. The court in *Mason* found it "beyond dispute" that such a warrantless search condition in narcotics cases was authorized under the statute, being related to the probationer's reformation and rehabilitation in the light of the offense of which he was convicted. *Id.* & n.2. California Penal Code section 1203.1 has been amended several times in the last three decades without alteration to *Mason*'s holding. Additionally, with respect to selected offenses carrying an acute risk of recidivism involving child molestation, abuse or neglect, a special release program in this State entitled deferred entry of judgment has been enacted that expressly requires the offender's submission to search or seizure by any probation officer or law enforcement officer. Cal. Penal Code § 1000.12(c)(1) & (c)(4)(D). Finally, under California's Proposition 36, effective July 1, 2001, adults convicted of misdemeanor or felony "non-violent drug possession offenses," may not be sentenced to jail or prison, and subject to certain exceptions must instead be granted probation. The law prohibits incarceration, requires completion of a drug treatment program and provides that "the trial court is not otherwise limited in the type of probation conditions it may impose." Cal. Penal Code § 1210.1(a), added by Prop. 36, § 5 [The Substance Abuse and Crime Prevention Act of 2000], adopt. at the Gen. Elec., November 2000. Thus, California's electorate has authorized warrantless searches by law enforcement officers as permitted under prior state law whenever adult drug offenders are admitted to Proposition 36 probation.

By the end of 1998, the year this case arose, California's adult probation caseload in felony and misdemeanor cases stood at 324,427. Criminal Justice Statistics Center, Cal. Dept. of Justice, *California Criminal Justice Profile*, Tables 7 & 23 (1998), *available at*

http://caag.state.ca.us/cjsc/prof98/toc/toc59.pdf. A measure of the significant resources consumed supervising probationers in this State appears in the fact that California courts revoked probation in 43,650 felony cases and in 18,858 misdemeanor cases in that single year. *Id.* Tables 25 & 26. The State had only 7,368 probation officers compared to 67,035 sworn law enforcement officers. *Id.* at Table 9.

The resources available for probation services are not unlimited. It is evident that in California, the impossibility of utilizing search conditions to investigate the probationer's involvement in further violations of the law would mean that in numerous cases the court could not fashion probationary terms that serve the needs of the particular offender and assure an adequate level of supervision. It is unlikely that prohibiting probation searches for investigative purposes by the police would result in increased privacy for California's probationers. Instead, there would be a reallocation of probation services away from rehabilitative programs, vocational counseling, drug testing and education toward investigative searches of probationers. Offenders who would otherwise enjoy the liberty of probation would suffer from an increased judicial preference for jail and prison terms to maintain adequate control over them. Such a result is not only contrary to the clear policy preferences of Californians generally but is unnecessary in light of the long-standing jurisprudence of this Court approving consensual searches and of the California Supreme Court, which has for decades relied on the consent principle to validate investigative searches in order to further the reformatory and supervisory objectives of the State's probation system.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Dated: July 11, 2001

Respectfully submitted,

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